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SUGUMAR BALAKRISHNAN

v.

THE CHIEF MINISTER OF THE STATE OF SABAH

HIGH COURT BORNEO, KOTA KINABALU

ABU MANSOR ALI, J

b

[ORIGINATING MOTION NO. 20 OF 1987]

11 DECEMBER 1987

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ADMINISTRATIVE LAW: Leave sought - Application for prohibition against Chief Minister - Natural Justice - Submission on wrong basis that decision was made - Action in truth against State Government - Effect of prohibition amounts to an injunction - Court not empowered to do so - Leave not granted as to prevent unnecessary expense in frivolous or vexatious action.

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The applicant is an advocate and solicitor and a Malaysian citizen born in Peninsular Malaysia. On 7 December 1987, the applicant was served with a notice from the office of the respondent asking him to show cause as to why the State Authority may not, pursuant to para. 2 of the Non-Application of Exemption Order 1984, publish in the Federal Gazette that the Exemption Order 1984 may not apply to the applicant the effect of which deprives the applicant the privilege of entering Sabah by producing only his National Registration Card. By an *ex parte* notice of motion dated 10 December 1987, applicant applied for an order that leave be granted to apply for an order of prohibition to prohibit the publication of the notification in the Federal Gazette.

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Held:

[1] In the present case, no decision has been made as the State Authority has yet to consider and to decide on the applicant's notice to show cause. However, applicant's submission was on the basis that decision was made and authorities cited were irrelevant.

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[2] The Court is precluded from granting the order of prohibition because this tantamounts to granting an injunction which is barred by s. 29(2) of the Government Proceedings Ordinance, 1956.

[3] As the Court is of the view that applicant will fail in his application in the subsequent substantive motion if leave is granted, leave is refused to prevent unnecessary expenses in frivolous or vexatious action or continuing an action which was certain to fail.

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[Leave refused. Application for notice of motion dismissed.]

Cases referred to:

Maradana Mosque Trustees v. Badiuddin Mahmud & Anor. [1967] AC 13
J.P. Berthelsen v. Director-General of Immigration Malaysia [1986] CLJ (Rep) 160
Metropolitan Properties Co. Ltd. v. Lannon & Ors. [1968] 3 All ER 304
R. Sambasivam v. Public Services Commission [1970] 1 MLJ 61
David Anthony v. Public Prosecutor [1985] 1 MLJ 453
Congreve v. Home Office [1976] 1 All ER 697
Metropolitan Bank v. Pooley [1885] 10 AC 221
Riches v. Director of Public Prosecutions [1973] 1 WLR 1019

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Legislation referred to:

Government Proceedings Ordinance 1956, s. 29(2)
 Rules of the High Court 1980, O. 53

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Other source referred to:

Review of Administrative Action, Harry Whitmore & Mark Aronson, p. 101

For the applicant - Sugumar Balakrishnan M/s. Sugumar & Co.

JUDGMENT

Abu Mansor Ali J:

By the applicant's *ex parte* notice of motion dated 10 December 1987, he applied for an order that leave be granted under O. 53 of the Rules of the High Court 1980 to apply for an order of prohibition to prohibit the respondent from publishing in the Federal Gazette a notification to the effect that the Immigration and Passport (Exemption) Order 1984 (PU(A) 270/1984) (hereinafter referred to as the Exemption Order 1984) shall not apply to the applicant pursuant to the Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984 (PU (A) 343/1984) (hereinafter referred to as the Non-Application of Exemption Order 1984) and also an order that all proceedings in respect of the respondent's intended action be stayed until after hearing of the motion. I heard the applicant on 11 December 1987 and I dismissed the applicant's application for leave. I now give my reason for doing so.

To have a proper perspective it is necessary to set out the background of the present application. The applicant is a Malaysian citizen born in peninsular Malaysia. He is an advocate and solicitor and practices under the name and style of M/s. Sugumar & Co., of which he is the sole proprietor. On 7 December 1987 the applicant was served with a notice from the office of the respondent. The notice asked the applicant to show cause why the State authority may not, pursuant to para. 2 of the Non-Application of Exemption Order 1984, publish in the Federal Gazette that the Exemption Order 1984 may not apply to the applicant, the effect of which would be that the applicant may not but can only enter Sabah, if allowed, by using a proper travel document, i.e., a proper passport, whereas under the Exemption Order 1984, he had been allowed and had enjoyed the privilege of entering Sabah by producing only his National Registration card. The applicant fearing that he may lose this privilege of entry into Sabah by means of this informal mode of entry under the Exemption Order 1984 files the notice of motion for leave to issue the writ of prohibition on 8 December 1987. The applicant's main intention is to stop the respondent or the State Authority in the exercise of his or their intended action under para. 2 of that Order which reads:

P.U. (A) 343

Immigration Act 1959/63
Passport Act 1966

Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984

Act 155 Act 150

In exercise of the powers conferred by s. 55 of the Immigration Act 1959/63 and s. 4 of the Passport Act 1966, the Minister, with the concurrence of the State Authority of Sabah, makes the following order:

Citation

1. This order may be cited as the Immigration and Passport (Exemption) (Non-Application of Exemption) (Sabah) Order 1984.

Non-application of Immigration and Passport (Exemption) Order 1984 in its application to the State of Sabah shall not apply to any person or class of persons specified in a notification in the Federal Gazette by the State Authority of Sabah from time to time.

- a* Made 20 September 1984.
(KDN. S. 100/215/I; PN. (PU) 100/III)

sgd: Dato: Musa Hitam
Minister of Home Affairs

- b* In his application the applicant cited four grounds. They are that the respondent's intended action was contrary to the rules of natural justice in that no ground or reason has been given in respect of the same that the respondent's intended action was *mala fide*, that there was likelihood of bias and, lastly, that the respondent's intended action was an abuse of power being a colourable exercise based on improper purpose and irrelevant considerations.
- c* Touching on the respondent's failure to observe natural justice, the applicant submitted that the absence of grounds was a clear breach of the rules of natural justice and made it difficult for him to make representation. On *mala fide*, the applicant cited, in para. 17 of his affidavit affirmed on 8 December 1987, the 22 instances where he had acted as Counsel for clients in bringing suits against the respondent or the State Government or State Government agencies or members of the Sabah State Government. The applicant alleged that it was because he had acted as such Counsel that the intended action is taken against him to deter him from performing his duties as Counsel. Then on the allegation that there is a likelihood of bias,
- d* the applicant says there is such likelihood by reason of the respondent being the party sued and at the same time having to decide the applicant's fate in the notice to show cause. The applicant also alleged that under the abuse of power contention, the applicant had of late been acting for one client, Haji Laugan Tarki bin Hj. Mohd. Noor, who had recently made several reports against the respondent and his government members for alleged corrupt practice. The applicant says this notice served on him was with the intention of giving him
- e* a warning to desist acting as Counsel for Hj. Laugan Tarki. The applicant cited a number of relevant authorities on the point which may be pertinent if this action is one for leave to issue *certiorari* proceedings. Amongst the cases cited was *Maradana Mosque Trustees v. Badiuddin Mahmud & Anor.* [1967] AC 13 where the principle of natural justice was infringed when the notice to show cause did not contain sufficient grounds. On the necessity of notice, we were referred to Harry Whitmore and Mark Aronson's "*Review of Administrative Action*"
- f* at p. 101 - "Notice is truly at the heart of natural justice." Learned Counsel also cited the now landmark case of *J.P. Berthelsen v. Director-General of Immigration Malaysia* [1986] CLJ (Rep) 160 saying that the present application was similar in that it is of the forfeiture type. He cited others on the same point which are not necessary to mention. On the ground of bias as infringing natural justice, he cited *Metropolitan Properties Co. Ltd v. Lannon & Ors.* [1968] 3 All ER 304; *R. Sambasivam v. Public Services Commission* [1970] 1 MLJ 61 and *David Anthony v. Public Prosecutor* [1985] 1 MLJ 453, the ratio of which was that bias
- g* need not be actual bias but sufficient if there was a real likelihood of bias. For the contention that revocation of any licence is to be exercised in accordance with law, learned Counsel cited *Congreve v. Home Office* [1976] 1 All ER 697. With respect I was of the view, as I have said, that the authorities cited may be relevant for *certiorari* but were irrelevant and were of no assistance to answer the issue before me whether at that stage an injunction can be
- h* given against the Chief Minister, a member of the Administration or a person acting under the general authority of the State Authority. That being the case, I did not consider these authorities cited to me in coming to the decision I finally did. They are irrelevant because there was then no order to quash as the State Authority has yet to consider and decide on the applicant's notice to show cause. The applicant, to my mind, misconceived the application and went to submit on the basis as if the respondent had made a decision in this matter.
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I then proceeded to consider the relevant question before me whether or not at that stage, I could grant the applicant's application for leave. It is clear that O. 53, Rules of the High Court 1980 requiring leave be granted is to prevent unnecessary applications being made. I considered that the respondent issued his notice to show cause on the 7 December 1987. The notice gave applicant one week within which to show cause why the Exemption Order 1984 should not apply to the applicant. The applicant filed his application for leave on 8 December 1987 and we heard it on 11 December 1987. It is clear that the respondent or to be exact the State Authority under that Order has still to decide and make a decision in the matter of the applicant's notice to show cause. Since para. 2 of the Non-Application of Exemption Order 1984 speaks of the power being the power of the State Authority to publish in the said gazette, in short the applicant's action is in truth against the State Authority or the State Government of Sabah.

Returning to consider whether at that stage of the application for leave can the Court issue the required leave? Before we answer that, we need to go a stage further. Assuming the applicant gets leave, would the Court in a subsequent Notice of Motion grant the sought order of prohibition stopping the State Authority or the State Government from deciding on the matter of the applicant's notice to show cause? Assuming again leave is granted, can the Court order stay?

In my view, what governs the power of the Court to issue such a prohibition is s. 29(2) of the Government Proceedings Ordinance 1956. Section 29 provides:

29. (1) In any civil proceedings by or against the Government the Court shall, subject to the provisions of this Ordinance, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such an appropriate relief as the case may require:

Provided that -

(a) Where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) ...

...

...

(2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

It is therefore clear to the Court that the Court is precluded from granting the order of prohibition as the effect of granting such an order against the present respondent would be the same as if granting it against the State Authority or State Government where the Court is not empowered to give by virtue of sub-section (2) of s. 29 thereof.

The granting of the application for leave is within the Court's discretion to give. It would be granted if the applicant has some semblance of a chance of succeeding in the substantive motion after leave. The Court is of the view that where the applicant would have no chance of succeeding in his application in the subsequent substantive motion if leave is granted, it is only right and proper that leave be refused to prevent a party being put to unnecessary

a expense in frivolous or vexatious actions or continuing an action which was certain to fail. (See *Metropolitan Bank v. Pooley* [1885] 10 AC 221 and *Riches v. Director of Public Prosecutions* [1973] 1 WLR 1019). For reason given, I therefore refused leave and I dismissed applicant's notice of motion. The applicant appeals.

b Also found at [1988] 2 CLJ 878

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